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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re MALCOLM W., a Person Coming  
Under the Juvenile Court Law.

B214601  
(Los Angeles County  
Super. Ct. No. JJ14761)

THE PEOPLE,

Plaintiff and Respondent,

v.

MALCOLM W.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, Donna Groman, Judge. Remanded with directions, and otherwise affirmed.

Mary Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Robert S. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Malcolm W., a minor, appeals an order continuing him as a ward of the state under Welfare and Institutions Code section 602. Malcolm was placed in the camp-community placement program for a period not to exceed four years, eight months. He contends the juvenile court erred by (1) failing to declare whether one of the charged offenses, possession of a firearm by a minor (Pen. Code, § 12101, subd. (a)(1)), was a felony or a misdemeanor, and (2) imposing an unconstitutionally vague probation condition. As the People concede, Malcolm's contentions have merit. We remand so the juvenile court may comply with Welfare and Institutions Code section 702, and clarify the challenged probation condition. In all other respects, we affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

A juvenile petition filed on January 29, 2007, alleged that on September 12, 2006, 13-year-old Malcolm unlawfully drove or took a vehicle (Veh. Code, § 10851, subd. (a)) and drove without a license (Veh. Code, § 12500, subd. (a)). A second petition, also filed on January 29, 2007, alleged that on November 28, 2006, Malcolm received stolen property (Pen. Code, § 496, subd. (a)). On March 15, 2007, Malcolm admitted driving or taking a vehicle and receiving stolen property as alleged in the two petitions. The juvenile court sustained the petitions,<sup>2</sup> declared both offenses to be felonies, declared Malcolm a ward of the state (Welf. & Inst. Code, § 602), and placed Malcolm home on probation for a period not to exceed three years, eight months. The court imposed a variety of probation conditions, including that Malcolm was not to "associate with anyone disapproved of by your parents or probation officer." The court also imposed a restitution fine.

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<sup>1</sup> Because the evidentiary details of the offenses are not relevant to the issues presented on appeal, we do not recite them here.

<sup>2</sup> The allegation that Malcolm drove without a license was dismissed as part of a negotiated disposition.

On December 29, 2008, the People filed a third petition alleging that on November 7, 2008, Malcolm possessed burglary tools, a misdemeanor (Pen. Code, § 466). Before that petition was adjudicated, on January 14, 2009 the People filed a fourth petition alleging that on January 12, 2009, Malcolm unlawfully possessed a firearm (Pen. Code, § 12101, subd. (a)(1)) and live ammunition (Pen. Code, § 12101, subd. (b)(1)), and gave false information to a police officer (Pen. Code, § 148.9, subd. (a)). After a contested hearing on the January 14, 2009 petition, the juvenile court sustained the petition.

At a subsequent dispositional hearing, Malcolm admitted possessing burglary tools as alleged in the December 29, 2008 petition, which the court sustained. The juvenile court ordered that Malcolm remain a ward of the court. (Welf. & Inst. Code, § 602.) It further ordered Malcolm suitably placed, with a maximum confinement period of four years, eight months, and ordered him to adhere to the probation conditions previously set. The juvenile court noted that possession of ammunition and possession of burglary tools were misdemeanors, and that receiving stolen property and unlawfully driving or taking a vehicle were felonies. The court did not state whether Malcolm's possession of a firearm was a felony or a misdemeanor.<sup>3</sup>

## DISCUSSION

1. *The matter must be remanded to allow the juvenile court to exercise its discretion and declare the offense of possession of a firearm by a minor a felony or misdemeanor.*

Welfare and Institutions Code section 702 requires that when a “minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony.” Where such a “wobbler” offense is at issue, an “explicit

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<sup>3</sup> The offense of giving false information to a police officer is, and was alleged to be, a misdemeanor. (Pen. Code, § 148.9, subd. (a).)

declaration by the juvenile court” is required. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204; Welf. & Inst. Code, § 702.)

Possession of a firearm by a minor is a “wobbler” offense, punishable alternatively as a felony or a misdemeanor. (Pen. Code, § 12101, subd. (c); *In re Jose T.* (1997) 58 Cal.App.4th 1218, 1220.) The juvenile court was therefore required to expressly declare whether the offense was a felony or misdemeanor. (*In re Manzy W.*, *supra*, 14 Cal.4th at p. 1204.) It did not do so.

Remand is not automatic when a juvenile court fails to make the required declaration. The court’s error may be found harmless where the record shows that “the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler.” (*In re Manzy W.*, *supra*, 14 Cal.4th at p. 1209.) However, “neither the pleading, the minute order, nor the setting of a felony-level period of physical confinement may substitute for a declaration by the juvenile court as to whether an offense is a misdemeanor or felony. [Citation.]” (*Id.* at p. 1208.) Here, the record does not sufficiently demonstrate the juvenile court was aware of and exercised its discretion to treat the offense as either a felony or a misdemeanor. As the People concede, under these circumstances the matter must be remanded so the juvenile court may exercise its discretion and declare the offense a felony or misdemeanor. Should the juvenile court declare the offense a misdemeanor, it should adjust Malcolm’s maximum period of confinement accordingly.<sup>4</sup>

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<sup>4</sup> The question of whether the offense was a felony or misdemeanor is within the juvenile court’s discretion, and we express no opinion on the matter.

## 2. Probation condition.

As noted, probation condition No. 15 stated that Malcolm could not “associate with anyone disapproved of by your parents or probation officer.” Malcolm urges that this condition is unconstitutionally vague and overbroad because it does not include a knowledge requirement. As the People concede, Malcolm is correct. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890-891 [in the absence of an express requirement of knowledge, a probation condition requiring that a juvenile not associate with anyone “ ‘disapproved of by probation’ ” was vague and overbroad]; see also *In re Justin S.* (2001) 93 Cal.App.4th 811, 816; *People v. Lopez* (1998) 66 Cal.App.4th 615, 628.) Malcolm’s contention is cognizable on appeal despite his failure to object to the condition below. (*In re Sheena K.* at pp. 888-889.) Accordingly, on remand the juvenile court must modify the probation condition to include a knowledge requirement.

## DISPOSITION

The matter is remanded to the juvenile court, Department 260, so the juvenile court can (1) comply with Welfare and Institutions Code section 702 and, if necessary,

modify Malcolm's maximum period of confinement; and (2) modify probation condition No. 15 to include a knowledge requirement. The judgment is otherwise affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.